

FACTORY HOMES OUTLET

IBLA 99-258

Decided July 28, 2000

Appeal from a decision of the Area Manager, Little Snake Field Office, Craig, Colorado, Bureau of Land Management, determining trespass liability for unauthorized use of public lands. COC62461.

Affirmed.

1. Trespass: Generally

Under 43 C.F.R. § 2920.1-2(a), any use, occupancy, or development of the public lands without authorization, shall be considered a trespass. Where the record shows that a mobile homes business uses public land for storage of mobile homes, mobile home parts, and other vehicles without authorization, and continues to use such land despite being told by BLM on several occasions that authorization for use is required, the business is properly found to be in willful trespass.

2. Appraisals—Federal Land Policy and Management Act of 1976: Leases

BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. Where there is no showing of error in BLM's appraisal method, it normally must be rebutted by another appraisal.

3. Trespass: Measure of Damages

Anyone properly determined by BLM to be in trespass shall be liable to the United States for the reimbursement of all costs incurred by the United States in the investigation and termination of a trespass and the rental value of the lands for the time of the trespass. Where a trespasser does not take issue with the details of BLM's assessment of liability, the assessment is properly affirmed.

APPEARANCES: Brian Tice, Manager, Factory Homes Outlet, Craig, Colorado, for appellant; Lowell L. Madsen, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Factory Homes Outlet (FHO or appellant) has appealed from a decision of the Area Manager, Little Snake Field Office, Bureau of Land Management (BLM), dated March 4, 1999, requiring FHO to pay \$3,069 in trespass damages, pursuant to section 303(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1733(g) (1994), and its implementing regulation, 43 C.F.R. § 2920.1¹ 2, for the unauthorized use of approximately 1.25 acres of public land described as Lot 2, Tract C, sec. 6, T. 6 N., R. 90 W., Sixth Principal Meridian, Moffat County, Colorado.

On September 16, 1998, BLM Realty Specialist, Phillis A. Bowers completed an "Initial Report of Unauthorized Use" form documenting June 15, 1998, as the date trailers and vehicles were observed on BLM property. She noted that BLM Realty Specialist Craig Haynes, who had past dealings with Brian Tice, the Manager and Vice President of FHO, recommended that he obtain a permit to authorize FHO's use of BLM property, but that no application was filed.

By letter dated June 24, 1998, the Associate District Manager, Craig District Office, BLM, advised Brian Tice that appellant had parked a mobile home on a BLM lot located behind FHO's business and noted that some trailer home frames were partly on the lot also. Tice was informed that authorization was necessary in order to use the lot as a storage area and cautioned that continued and/or future use without an authorization would be subject to trespass action. BLM enclosed an application for a permit and allowed Tice 5 working days to either complete and return the application or to remove the mobile home and frames from the lot. Appellant did neither.

A typed note to the case file from someone with the initials CH, ¹/ reflects that on July 8, 1998, CH visited Tice at FHO to inquire about the trailer home which remained on the lot. Tice was advised to file an application for authorization to use the BLM lot. CH discussed the filing fee needed to accompany the application and the need for an appraisal to determine the rental. CH estimated the rental to be "about \$250.[00] per month." Tice said he would deliver the application to BLM that afternoon. He did not.

¹/ From the content of the note, we conclude that CH is in fact Realty Specialist Craig Haynes who previously "dealt with Brian Tice." See Initial Report of Unauthorized Use.

A memorandum to the file dated October 16, 1998, from Realty Specialist Bowers, subject: "Evidence to Willful Trespass COC62461," states that she visited the BLM lot to gather evidence for this case and that she talked to Tice and informed him that he was using BLM property without authorization. She also told him that "he could expect a letter from BLM putting him under willful trespass, and that he was expected to respond to the letter." In the memorandum, under the heading "Evidence," Bowers described two yellow Fords, a red truck, and a cream and tan Ford Escort GL and also three double wide trailers on BLM property. The case file contains photographs dated October 16, 1998, of the above-described vehicles and a legal description of the property.

An unsigned "Unauthorized Use Investigation Report" dated October 19, 1998, indicates that three double wide trailers and four vehicles were observed stored on BLM property. There are photographs also dated October 19, 1998, in the case file which confirm the presence of the trailers and vehicles on the BLM lot. The report stated that the unauthorized use was reported on June 15, 1998, and that investigations of the property took place on June 23, 1998, and October 16, 1998.

Also on October 19, 1998, the Area Manager, Little Snake Resource Area, issued a Notice of Willful Trespass, sent by certified mail and received by Tice on October 21, 1998, informing appellant that BLM had instituted willful trespass proceedings against FHO for unauthorized use of public land pursuant to FLPMA and 43 C.F.R. § 2920.1-2. In his letter, the Area Manager recounted the events, contacts, and the evidence supporting the initiation of trespass proceedings. Appellant was provided an opportunity "to present evidence to BLM which tends to show that it is not in trespass" within 5 working days.

Appellant filed a timely response stating that occasionally, he reorganized his lot to free up sold units and reestablish stock units. According to Tice, this process is noncommercial and purely a shuffle of stock. Tice asserts that this "shuffle" involves moving stock on and off his property and casually using available public property (roads, streets, alleys, and vacant land). Because all of its products are mobile and not permanent structures, he argues that his use is "casual use" which is defined by 43 C.F.R. § 2920.0-5(k) as follows: "Casual use means any short term non-commercial activity which does not cause appreciable damage or disturbance to the public lands, their resources or improvements, and which is not prohibited by closure of the lands to such activities." Tice asserts that if his interpretation of this definition is incorrect, then his use of BLM property cannot be considered a willful trespass.

In his Notice of Cease and Desist dated October 29, 1998, the Area Manager advised appellant to cease and desist any use of the BLM property. Addressing Tice's response to his October 26, 1998, Notice of Willful Trespass, the Area Manager stated that BLM did not agree that the nature of FHO's use of the adjacent public land constituted noncommercial use. He also reminded appellant that on three different occasions Tice was informed

that placing FHO inventory on BLM land was not considered casual use and that in order to use the public land in conjunction with the business appellant needed to obtain authorization. See BLM letter dated June 24, 1998; BLM visit to FHO office on July 8, 1998; and BLM Notice of Willful Trespass dated October 21, 1998. The Area Manager also noted that on a number of occasions Tice was admonished that continued and/or future use of the BLM land without an authorization would be subject to trespass action. Id.

A memorandum to the case file dated November 10, 1998, from Realty Specialist Bowers confirms a meeting with Tice at which she explained the basis for the trespass action, including his failure to apply for authorization for use of the public land and his continued use of the property without authorization. She explained that BLM did not consider the use to be casual use because appellant had stored two single wide trailers on BLM property for 3 months or more each, and also explained what was necessary to resolve the trespass. Tice was advised that authorization to use the BLM property would not be granted until the willful trespass was resolved.

In the November 17, 1998, request for real estate appraisal, BLM noted that during the investigation, Tice learned that BLM was placing the action under willful trespass. BLM stated that the trailers were removed and that FHO had applied for a permit. BLM stated that after the trespass was resolved, it would be permitting the use.

In his "Memorandum of Appraisal" dated February 10, 1999, regarding the trespass rental estimate, the BLM appraiser referred to rural industrial use storage site lease data. He stated that drill rig storage sites have been renting for \$250 to \$300/month. He also referred to two recent storage leases in northern Moffat County: The first site, located on Three Forks Ranch, was leased for storage of a caterpillar, scraper, and truck with a rental of \$300/month; the second site, a vacant site located at Hiawatha Camp, was leased for storage of six trailers with a rental of \$50/single-wide trailer unit/month. 2/ The appraiser found that the subject trespass use was most similar to the Hiawatha trailer storage site lease, but that the subject site location is far superior to the remote Hiawatha location. He noted that single-wide mobile home lots in Craig are renting for \$110/month, but include water, sewer, and trash service. Considering all factors, the appraiser concluded that the estimated fair market rental for the subject mobile home storage was \$75/month/unit.

In the March 4, 1999, trespass decision appealed herein, BLM referenced its initial letter of June 24, 1998, its Notice of Willful Trespass and Tice's response thereto advising him that BLM had instituted willful

2/ In the event BLM decides to issue a lease after the trespass liability is resolved, the appraiser recommended a lease rental of \$350/month in advance based upon his analysis of six similar light industrial/commercial lot rentals in Craig, Colorado.

trespass proceedings against FHO for the unauthorized use of public land pursuant to 43 C.F.R. § 2920.1-2 and FLPMA. BLM enclosed a bill for collection, determining his trespass liability in the amount of \$3,069. That amount included \$386 for labor costs, \$10 for pictures, \$858 for appraisal cost, and \$1,815 for land rent liability and willful trespass penalty. 3/

On appeal, Tice states that BLM informed FHO in June 1998 that it had some houses crossing the BLM property and that FHO could pay rent if it decided to keep them there. According to Tice, BLM said that the rent would be about \$200 a month. Tice relates that in October 1998 BLM told FHO to move the homes and that it would receive a bill for the time they were on BLM property. Tice states that FHO removed the homes immediately. Assuming that the rent was about \$200 a month, Tice said that FHO agreed to pay.

Tice contends that the amount of BLM's bill is excessive. He does not understand why FHO should be charged labor and appraisal costs. He believes that since FHO agreed to pay the rent, it should not be responsible for labor and appraisal costs.

In a "Confirmation/Report of Telephone Conversation" Realty Specialist Bowers stated that she called Tice to clarify that the bill for collection was for resolution of the willful trespass and not a bill for collection of the rental due as a result of the adjudication of his application for use.

In its Answer, BLM notes that apparently FHO believes that BLM's decision is a notification of monthly rental rather than a demand for payment of damages for trespass. (Answer at 3.) BLM states that if FHO's appeal is interpreted as a challenge to the amount of the damages assessed by BLM, its statement of reasons fails to show that BLM erred in that regard. BLM asserts that FHO does not deny that it trespassed upon the public land, that it has not shown that BLM's appraisal determining the monthly rental is erroneous, that it does not deny that its occupation of the public land constituted a willful trespass, and that it has not shown that the sum demanded by BLM to resolve the trespass is inappropriate to compensate for the willful trespass. (Answer at 3-4.) BLM asserts

3/ Based on the \$75/month/unit figure, the appraiser, in his memorandum, calculated the rental on two single-wide units as follows: $\$75 \times 2 = \$150/\text{month}$; $\$150 \times 3 \text{ months}$, plus interest = \$453.76. He included a willful trespass penalty of \$907.52 (twice the land rent due) and calculated the total land rent liability and willful trespass penalty due on Jan. 27, 1999, to be \$1,361.28, rounded to \$1,360. That amount was incorrect. The applicable regulation, 43 C.F.R. § 2920.1-2(b)(2), provides that the penalty for willful trespass is "three times the fair market rental value which has accrued since the inception of the trespass * * *."

that FHO's use of the public land was unauthorized within the meaning of section 303(g) of FLPMA, 43 U.S.C. § 1733(g) (1994), and that the costs and penalties were properly assessed under 43 C.F.R. § 2920.1! 2(a) and (b). (Answer at 4-5.) BLM asserts that FHO has not shown that the appraisal of the fair market rental value of BLM's property is incorrect, and argues that its decision should be affirmed. (Answer at 5, 6.)

[1] Appellant does not dispute that it was advised that authorization was required in order to use BLM's property. Section 303(g) of FLPMA provides that: "The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary [of the Interior] * * * is unlawful and prohibited." 43 U.S.C. § 1733(g) (1994). Implementing regulations provide that "[a]ny use, occupancy, or development of the public lands, * * * without authorization under the procedures in § 2920.1! 1 of this title, shall be considered a trespass." 43 C.F.R. § 2920.1! 2(a). Anyone determined to be in trespass by the authorized officer is entitled to notice of that fact and is liable to the United States for various costs and expenses, as listed in the regulations. 43 C.F.R. § 2920.1-2(a) and (b). Under 43 C.F.R. § 2920.0-5(m), "[a] consistent pattern of performance or failure to perform * * * may be sufficient to establish the knowing or willful nature of the conduct, where such consistent pattern is neither the result of honest mistake or mere inadvertency."

The applicability of 43 C.F.R. § 2920.1! 2 "hinges on whether the use, occupancy, or development [of the public lands] was without authorization 'under the procedures in § 2920.1! 1 [of 43 C.F.R.]'" William H. Snively, 136 IBLA 350, 356 (1996) (quoting from 43 C.F.R. § 2920.1! 2(a)). According to 43 C.F.R. § 2920.1-1, "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part." There is no statutory or regulatory provision which specifically authorizes or forbids the use and occupancy of the BLM lot in conjunction with an ongoing business operation as contemplated by FHO. Thus appellant's use of the BLM lot is subject to authorization under 43 C.F.R. § 2920.1-1. The continued presence of mobile homes and vehicles on BLM property without authorization under 43 C.F.R. § 2920.1! 1, constituted a trespass, and subjected appellant to trespass liability, under section 303(g) of FLPMA, 43 U.S.C. § 1733(g) (1994), and 43 C.F.R. § 2920.1! 2. There is no evidence in the record that appellant had any authorization under 43 C.F.R. Part 2920 to occupy the land in question on October 29, 1998, when BLM issued its notification to cease and desist any use of BLM's property.

Also, the continued presence of mobile homes and vehicles on BLM property without authorization for over 3 months shows a consistent pattern of performance sufficient to establish the willful nature of the trespass. It is clear that FHO had been informed that its presence on BLM property was unauthorized. Consequently, FHO's conduct was not the result of honest mistake or mere inadvertence. See 43 C.F.R. § 2920.0-5(m). Therefore, we find that BLM properly determined that FHO was in trespass and that the trespass was willful.

[2, 3] Anyone properly determined by BLM to be in trespass on Federally-owned lands shall be liable to the United States for damages, including the fair market value rental of the lands for the current year and past years of trespass, and the administrative costs incurred by the United States as a consequence of such trespass. 43 C.F.R. § 2920.1-2(a)(1) and (2). Michael and Karen Rodgers, 137 IBLA 131, 135 (1996); Sierra Production Service, 118 IBLA 259, 263 (1991).

We find that the appraiser properly calculated the fair market rental at \$453.76 and that the total land rent liability and willful trespass penalty due on January 27, 1999, is \$1,815.04, rounded to \$1,815, as set forth in BLM's bill for collection.

As a rule, BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. Regina B. Perry, 142 IBLA 278, 281 (1998); Gerald L. Overstreet, 112 IBLA 211, 214 (1989). Where there is no showing of error in BLM's appraisal method, it normally must be rebutted by another appraisal. Russell A. Beaver, 121 IBLA 386, 392 (1991); Great Co., 112 IBLA 239, 242 (1989).

Where a trespasser does not take issue with the details of BLM's assessment of liability, the assessment is properly affirmed. Michael and Karen Rodgers, *supra*; Double J Land & Cattle Co., 126 IBLA 101, 109 (1993), *aff'd in part, rev'd in part on other grounds*, Double J. Land & Cattle Co. v. U.S. Department of Interior, 91 F.3d 1378 (10th Cir. 1996).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

James P. Terry
Administrative Judge

